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Supreme Court of the United States

OCTOBER TERM, 1952.

No. 282

DEALER'S TRANSPORT COMPANY,
Petitioner,

v.

PAUL C. GRASSE,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

GORDON R. CLOSE
F. TROWBRIDGE VOM BAUR
KENNETH W. BELLILE
135 South LaSalle Street,
Chicago 3, Illinois
Counsel for Petitioners

LORD, BISSELL & KADYK
of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

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The Judgment and Opinion Below: In the interests of accuracy we must point out that the statement in Respondent's Brief (p. 1) that March 20, 1952 was the date of both judgment and decree, is incorrect. There was no "entry" (28 U.S.C. 2101 (c)) of the judgment dated March 20, until May 23, 1952, after the Petition for Rehearing, filed on April 14, 1952, was denied on May 20, 1952. The filing of the Petition for Rehearing suspended the running of the time for filing the Petition for Certiorari.

Questions Presented: Respondent does not object to the accuracy of the phrases "Employee", "First Party Employer" and "Third Party Employer" for our case, but he would like to broaden the case so as to bring in "tortfeasors" generally. Our case does not involve "tort-

feasors" generally, only the parties described—Employee, First Party Employer, and Third Party Employer.

Respondent's Summary Statement: Respondent denies that in Count II of the complaint Plaintiffs rely on the first paragraph of Section 29. However, Count II states that "Plaintiff, Swift & Company, was bound by the provisions of said Act in respect to all of its employees in Illinois, including the plaintiff, Grasse." (R. 4, 5). Since it is alleged that Swift & Company was bound by the Act, and the first paragraph of the Section is the only provision dealing with Third Party Employers bound by the Act, Count II of the complaint necessarily relies on that paragraph.

POINT ONE.

THE DECISION OF THE COURT BELOW IS NOT BASED ON NON-FEDERAL GROUNDS ADEQUATE TO SUPPORT IT.

(In Reply to Respondent's Point 1 A, Page 5)

A. Respondent Makes No Claim That The Primary Holding of the Decision Below, That the Statute is Beyond the Scope of the Police Power Because it Does Not Regulate the Master-Servant Relationship, is Based on An Adequate Non-Federal Ground.

The argument made, beginning on page 5 of Respondent's Petition, regarding the existence of an alleged adequate non-federal ground to support the decision below, is not directed to the basic and primary holding of the decision below, which is embodied in the first question presented by the Petition (p. 4). Respondent's argument is directed solely to the *alternative* holding of the Court below, which is embodied in the second question presented.

The reason for this is that the Court below did not purport to base its primary holding on any non-federal ground. On the contrary, this, the basic ground of the decision, was based only on a federal ground, *viz.*: that the statute is beyond the scope of the police power because it does not regulate the master-servant relationship. The Court below stated (R. 31-32, Petition p. 11-12) that if the paragraph did regulate the master-servant or employment relationship, it would be a "reasonable exercise of the police power" (R. 31-32). Hence there is no possibility of there being a non-federal ground to support the primary or basic holding of the Court.

The statute can and should be upheld as a reasonable exercise of the police power because it does regulate the master-servant or employment relationship. The validity of the statute having been thus established, there would then be no occasion to consider the alternative holding of the Court and the subject of a possible non-federal ground.

B. To the Extent That the Alternative Holding of the Court Below, Dealing With "Classifications" Is Based On a Non-Federal Ground, the Non-Federal Ground is Wholly Inadequate to Support The Judgment.

1. The Alleged Non-Federal Ground is Plainly Untenable: The Court below lumped its alternative holding as to the effect of the so-called "classifications", as follows:

> "On the basis of the foregoing analysis, it is apparent that the arbitrary classifications created by the first paragraph of section 29 of the act do not constitute a reasonable exercise of the police power, and violate the guaranties of due process of law and equal protection of the laws under the Federal and State constitutions, as well as section

> 22 of Article IV of the Illinois Constitution, forbidding special laws granting special privileges and immunities, and the policy of the State constitution set forth in section 19 of article II, providing that every person ought to find a certain remedy in the law for all injuries and wrongs which may be received to an individual's person, property or reputation." (R. 39-40).

Under that language, the thing which was supposed to have created all the "violation" of constitutional guarantees was the "arbitrary classifications created by the first paragraph of Section 29 of the Act". Hence, if no "classifications" are created by the first paragraph of Section 29, then the thing which was supposed to have caused all the "violation" of the federal and state constitutions simply does not exist. And except for mere general assertion, Respondent does not dispute our argument that the first paragraph of the Section does not create any "classifications" at all, but that all persons affected are treated alike in the same situation and circumstance.

We submit, therefore, that the statements in the opinion below, to the effect that the first paragraph of Section 29 created "classifications" is a mere mirage which finds no support in the language of the statute. Accordingly, the alleged non-federal ground based on the existence of "classifications" is plainly untenable, and is error of the most transparent kind. It is settled by the decisions of this Court that if an alleged non-federal ground is plainly untenable, it is inadequate and this Court will take jurisdiction. *Williams* v. *Kaiser* (1945) 323 U.S. 471, 478-479; *Lawrence* v. *State Tax Commission* (1932) 286 U.S. 276, 282; *Ward* v. *Love County* (1920), 253 U.S. 17, 22.

2. The Alleged Non-Federal Ground Is Interwoven With the Federal Ground: Also, the alleged non-federal ground is, in its entirety, interwoven with the federal ground. For the Court below held that the alleged "classifications" were "arbitrary", and that this was a violation of the equal protection and due process clauses of the federal and Illinois constitutions and of other comparable provisions of the Illinois constitution. It was the supposed "arbitrariness" of the so-called "classifications" which were said to have the *uniform* effect of violating all these provisions of both federal and state constitutions. The single ground of the violation of both federal and Illinois constitutions is the theory of arbitrariness. Since there are not even any "classifications" set up by the statute which could be "arbitrary", then the whole ground of violation of constitutional guaranties is eliminated. In short, the alleged non-federal ground and the federal ground are completely and inextricably interwoven because both are bottomed on the same assumption; and if the federal ground cannot stand, the non-federal ground cannot stand, either. The decisions of this Court are clear that an alleged non-federal ground is inadequate to support the decision below, where it is so interwoven with the federal ground as not to be an independent matter. *State Tax Commission* v. *Van Cott* (1939) 306 U.S. 511, 513-514; *Enterprise Irrigation District* v. *Canal Co.* (1917) 243 U.S. 157; 164; *Abie State Bank* v. *Bryan* (1931) 282 U.S. 765, 772-773; *Fox Film Corp.* v. *Muller* (1935) 296 U.S. 207, 210-211.

POINT TWO.

THE JUDGMENT BELOW IS A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. 1257(3).

(In Reply to Respondent's Point I B, p. 9)

The decision below struck out the additional defense set forth in the Answer and finally adjudicated that Defendant could not defend by virtue of the provisions of the first paragraph of Section 29. That is a perfectly clear adjudication of the crucial right of Petitioner to defend under the statute; and the Respondent is wholly in error in saying that "no right of the Petitioner has been adjudicated" (Respondent's Brief p. 9).

Moreover, it is an adjudication of the only federal question in the case; even Respondent does not attempt to describe any other federal question which could conceivably arise in the case hereafter. It is a simple negligence case which cannot remotely give rise to any further federal question.

POINT THREE.

THE PETITION PRESENTS A FEDERAL QUESTION OF THE MOST SUBSTANTIAL CHARACTER:

(In Reply to Respondent's I C, p. 12)

Here Respondent argues that the Petition presents "no substantial" federal question. In the next breath he attacks the statute in question as "hydraheaded", "unfair", "peculiarly oppressive" and "unreasonable". We deny that any of these sinister adjectives can be applied to the first paragraph of Section 29. That they cannot be so applied is shown, in part, by the fact that Respondent does not dispute, except by general assertion, that no "classifications" have been created by the paragraph, but that on the contrary it treats all persons alike in the same situation and circumstance.

Above all, Respondent does not deny that the basic question of whether this statute is unconstitutional as beyond the scope of police power, on the theory that it does not even regulate the master-servant relationship, is a federal question of far-reaching importance.

* * *

We shall discuss the other points in Respondent's Brief at lesser length.

1A. Questions As To the Operation and Effect of the Statute Are For This Court:

(Respondent's Brief, p. 13)

The question whether the first paragraph of Section 29 regulates the employment relationship, is not, as Respondent asserts, one of construction of the statute, but a question as to its operation and effect. As a question of the operation and effect of the statute it is a prime question for this Court, and the decision of the State Court is not binding. *Richfield Oil Corporation* v. *State Board of Equalization* (1946) 329 U.S. 69, 84 and cases cited.

1B. The Effect of the Decision Below Is To Deny Petitioner the Benefits of the Tenth Amendment:

(Respondent's Brief, p. 13)

Respondent does not deny that the existence of the police power is federally guaranteed to the States and to the people thereof by the Tenth Amendment. He does, however, deny that it is guaranteed to the Legislatures of the States, or to the Petitioner as one of the people of the State of Illinois. We submit that the benefits of the Tenth Amendment's guarantee of the police power clearly extend to both the Illinois Legislature and the Petitioner.

The State Judiciary has now erroneously overruled the State Legislature on a federal question—the scope of the police power. In doing so it has (a) denied this Petitioner the benefits of the statute and of the Tenth Amendment; and (b) erroneously confined the police power to a scope narrower than that which the Illinois Legislature is entitled to exercise under the Tenth Amendment, leaving it powerless to deal further with the subject.

1C. The Decision Below Does Conflict With the Meese Case:

(Respondent's Brief, pp. 14-15)

Respondent does not deny that the Washington statute was held to be constitutional in the *Meese* case as against a claim of denial of equal protection. The claim was there considered to be rather flimsy, as we submit it is here. He also does not dispute that the theory of that decision was that the similar statute there involved did regulate the master-servant or employment relationship.

The *Meese* case, incidentally, was cited by us below both in Petitioner's Petition for Rehearing, filed on April 14, 1952, and also in Petitioner's Motion for Leave to File a Petition for Rehearing addressed to the revised and amended decision of May 20, 1952, filed on June 2, 1952.

2. Respondent Does Not Dispute That The Decision Below Conflicts With All Other Cases Upholding the Constitutionality of Similar Laws:

(Respondent's Brief p. 15)

He merely says that this fact is "irrelevant". He says further that the cases on pp. 18 and 19 of our Petition were not cited in the Court below. They were not cited

in the original briefs because Petitioner at that time did not anticipate that the Court below would hold that the statute did not even regulate the master-servant employment relationship. The argument that the statute did regulate the master-servant relationship was strongly urged in the Petitions for Rehearing.

3. The Statute Does Not Set Up Any "Classifications":
(Respondent's Brief p. 16)

Except to refer in general terms to the decision below, Respondent does not suggest that any arbitrary "classifications" have been set up; and he does not dispute that the real effect of the statute is to treat all persons alike in the same situation and circumstance.

In saying that we had conceded that "classifications" had been set up by the statute, the Court below very definitely did misstate our contentions. We there argued vigorously that the statute set up no classifications at all. Since our Petitions for Rehearing in the Court below are a part of the certified record in this Court, we respectfully refer the Court to our Petition for Rehearing, notably Point I contained at pp. 1-7 thereof; and to our Motion for Leave to File a Petition For Rehearing of the Court's Amended Decision of May 20, notably Point I contained at pp. 3-7 thereof. The Court below never faced or considered that argument, its opinion merely rolling along on the assumption that "classifications" had been set up by the statute.

4. That Plaintiff Grasse is Estopped to Assail the Constitutionality of the Act is Federal Law.
(Respondent's Brief, p. 17)

Respondent makes no attempt to dispute the argument contained in our Petition, pp. 21-23, that Grasse having claimed benefits under the Act with one hand is estopped

to assail its constitutionality with the other. Nor does he attempt to reply to *Daniels* v. *Tearney* (1880) 102 U. S. 415 and the other federal cases cited in our Petition.

5. Respondent does not dispute that the first paragraph of Section 29 is wholly integrated with the balance of the Act (Respondent's Brief p. 17).

6. Respondent does not deny that the decision below invalidates the statute as to Third Party Employers automatically bound, but sustains it as to those electively bound. We do not accept his estimate that those electively bound do not exceed 2% of the total number (Respondent's Brief p. 18).

7. The Importance of Review By This Court:
(Respondent's Brief, p. 18)

Respondent does not dispute that if the decision below is to stand, 1,000 to 5,000 new lawsuits against Third Party Employers already liable for Workmen's Compensation will be filed within the next year and within each succeeding year, on the already burdened Illinois Courts.

We deny the charges in Respondent's Brief, p. 18 that the first paragraph of Section 29 is "arbitrary" and unfair. He asserts that the new flood of lawsuits created by the decision below is wholly justifiable because they may be filed against "tortfeasors" who "formerly enjoyed immunity". But here he is in the most serious error. First, the case does not involve "tortfeasors" generally, but only Third Party Employers specifically, that is, people who have an employment relationship. They have not formerly enjoyed any immunity at all. Indeed, by virtue of the fact that they are bound by the Illinois Workmen's Compensation Act, they were made lia

ble without fault for compensation to their own employees; and also to employees of First Party Employers negligently injured by their employees. A statutory liability for compensation has been substituted for the old common law liability, and it is a considerably greater liability, for the very purpose of Workmen's Compensation Acts was to impose a new system of rules carrying greater liability for employers. See *New York Central R. R.* v. *White* (1916) 243 U. S. 188.

Moreover, the amount payable as compensation frequently exceeds the amount recoverable in a negligence lawsuit against a Third Party Employer. First, the hazards of a lawsuit sometimes make any recovery impossible through difficulty of proof of negligence, freedom from contributory negligence, agency, etc.; while compensation under the Act is certain. Second, even where recovery is accomplished, the amount allowed as compensation is still often larger than the amount recoverable in tort. Thus in *Henson Robinson Co.* v. *Industrial Commission*, (1944) 386 Ill. 232, the Employee recovered $1,500 from the Third Party Employer in his suit for negligence, but was awarded compensation of $6,105. In *Feesek* v. *William Spencer & Sons*, (1935) 176 Atl. 196, Sup. Ct. N. J., compensation was awarded in the sum of $5,730.34, although the judgment entered against the Third Party Employer in a suit for negligence was only in the sum of $5,000. In *Ketler Company* v. *Industrial Commission*, (1946) 392 Ill. 564, compensation of $4,895 was awarded, while common law recovery against the Third Party Employer in tort was only $4,000.

It is futile for Respondent to say that he does not have any cash benefits in his pocket. The hospital expenses paid for his account have the same legal effect as if they were paid to him in cash; and Respondent concedes that he has been paid substantial sums in addition, as weekly benefits.

CONCLUSION.

A Writ of Certiorari should be granted.

Respectfully submitted,

GORDON R. CLOSE,
F. TROWBRIDGE VOM BAUR,
KENNETH W. BELLILE,
135 South LaSalle Street,
Chicago 3, Illinois
Counsel for Petitioners.

LORD, BISSELL & KADYK,
Of Counsel
September 4, 1952.